

ENGLISH JUDGMENT IS HELD ENFORCEABLE DESPITE CLAIMED DENIAL OF DUE PROCESS

In *Society of Lloyd's v. Grace* (Sup. Ct., N.Y., Nov. 30, 1999), a New York trial court held that an English judgment entered by the High Court of Justice, Queens' Bench Division granting Lloyd's of London relief against American "Names" is enforceable in New York, despite a disparity in the laws applied by the English courts. The court found, in conformity with principles of international comity, that Names cannot avoid being bound by an English judgment where they have previously agreed to English choice of forum and choice of law clauses simply because the applicable English laws may be less favorable than those of the United States.

Two individuals, Lorraine Graves Grace and Oliver R. Grace Jr., became underwriters, or "Names," in the Lloyd's market in 1979 and 1986, respectively. To become a Name, the Graces each travelled to London and signed a General Undertaking agreement ("General Undertaking"), which contained various provisions binding the parties. After becoming Names, the Graces participated in Lloyd's syndicates and accepted premiums thereunder.

In the late 1980's and early 1990's, Lloyd's began experiencing unusually large losses. As a result, and to permit Lloyd's to avoid market-stalling litigation, Lloyd's created a Plan for Reconstruction and Renewal in 1996 ("Plan"). Under the Plan, Lloyd's formed a new independent company, Equitas Reinsurance Ltd., to provide reinsurance to Names for certain years. Pursuant to the Plan, Equitas sent each Name, including the Graces, a "finality statement" setting forth the amount of "premium" due for the reinsurance based upon the exposure of each Name's syndicates for the relevant years. The Plan required that each Name pay the premium and obtain the reinsurance.

The Plan was challenged, and upheld, in the English courts despite their finding that the Names in those cases had shown some evidence that they

had been fraudulently induced to participate in the Lloyd's market. The English courts reached this holding by upholding a "pay now, sue later" clause in the Plan, which prohibited the Names from relying on fraud as a defense or set-off to Lloyd's claims. English proceedings by Lloyd's against Lorraine Grace and Oliver Grace, Jr. resulted in judgments in the amounts of UK £206,685.37 and UK £269,293.70, respectively.

Lloyd's sought enforcement of these judgments in New York State Supreme Court in the case at hand by motion for summary judgment in lieu of complaint. New York state courts generally recognize foreign judgments under the Uniform Foreign Country Money Judgments Act and the doctrine of comity so long as the judgments are based upon principles of jurisdiction and due process.

The Graces argued that the English judgments should not be enforceable against them in New York because the English judicial system did not follow procedures compatible with American concepts of due process. In particular, the Graces claimed that the English judgment was improperly determined before allowing the Graces an opportunity to be heard on their claim that Lloyd's fraudulently induced them into participating in the Lloyd's market.

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A New York County Supreme Court ultimately held that the Graces were not deprived of their right to due process and granted Lloyd's summary judgment motion seeking enforcement of the English judgments. The court noted that the Graces agreed in the General Underwriting to designate England in choice of forum and choice of law clauses with respect to the rights and obligations of the parties. The Graces were notified of, and participated in, the English proceeding by Lloyd's before a judgment was entered against them. As such, the Lloyd's Plan and the "pay now, sue later" clause therein, which was upheld by the English courts, is binding upon the Graces. In addition, the Graces failed to show they would be without adequate remedy to pursue their fraud claim in England in the future. In sum, while the court acknowledged that it would be "preferable" for the Graces' fraud claim to be heard on its merits prior to payment of these English judgments, it held that it is not in violation of New York or United States public policy to require payment of the judgments first. 🍀

—Brian A. Smith

SEXUAL MISCONDUCT COVERAGE LIMITATION READ NARROWLY

In *American Home Assurance Co. v. McDonald*, ___ Misc.2d ___, 698 N.Y.S.2d 436 (Sup. Ct., N.Y., 1999), a New York County Supreme Court set aside a policy exclusion that limits coverage in professional malpractice claims that includes allegations of sexual misconduct.

The plaintiff in the underlying malpractice case was a patient of a licensed social worker, who alleged that the social worker was negligent and careless in providing counseling and psychotherapy services. Although the complaint did not specifically mention a sexual relationship, rather relying on allegations that the social worker failed to "maintain professional boundaries," deposition testimony of the plaintiff was explicit in detailing a sexual relationship with the social worker. Moreover, the social worker admitted in a letter that a sexual relationship took place while he was the plaintiff's therapist. American Home, the social worker's insurer, stated that the relationship brought into play the \$25,000 coverage limitation, noting that the policy defined sexual misconduct allegations as

those involving "erotic physical contact . . . by any insured . . . with or to any former or current patient or client." American Home further argued that the sexual aspect of the case meant that the limitation would apply to all of the allegations of the complaint. The court held, however, that the limitation could not be imposed with such a broad application; and that to do so would discourage reporting by patients and clients sexual abuse in a therapeutic environment. The court held that "the expansion of the coverage limits placed on claims involving sexual misconduct on the part of an insured social worker to include claims of malpractice which do not involve the social worker's sexual misconduct violates the public policy of the State of New York." The court did, however, leave in place the limitation as it applied to allegations of sexual misconduct *per se*.

The ruling in *American Home Assurance Co. v. McDonald* is in direct conflict with a January 1999 opinion by a Suffolk County Supreme Court justice in *American Home Assurance Co. v. Levy*, 179 Misc.2d 773, 686 N.Y.S.2d 639 (Sup. Ct., Suffolk 1999), in which the same limitation was upheld and applied to all counts in the underlying complaint. This conflict assures that the issue will soon reach the appellate courts. 🍀

—Steven H. Rosenfeld

CLAIM FOR INSURANCE COVERAGE OF Y2K-RELATED CORRECTIONS NOT SUBJECT TO NEW FEDERAL LAW

A New York County Supreme Court has held that Xerox's claim against its insurer for coverage of approximately \$180 million spent to correct Y2K-related computer programming deficiencies is not subject to the Year 2000 Readiness and Responsibility Act, passed by Congress in July 1999, requiring a cooling-off period before litigation can proceed.

Xerox had filed suit against American Guarantee and Liability Insurance Company seeking affirmative and declaratory relief one day after American Guarantee commenced an action in New York seeking a declaration that Xerox was not entitled to coverage under its property insurance policy for the costs of correcting the computer coding. The corrections were necessary to avoid system failures on January 1, 2000, when computers that had been

coded to recognize only 2-digits dates for calendar years will read dates for the year 2000 as being in the 1900's.

Xerox's claim for coverage was made under the "sue and labor" clause of its policy, which requires an insured to mitigate damage to covered property and provides compensation for such mitigation expenses. In *American Guarantee and Liability Insurance Company v. Xerox Corporation*, 1999 WL 1244599 (Sup. Ct., N.Y. 1999), American Guarantee sought a declaration that coverage under its policy was not triggered, arguing that Xerox had failed to comply with the notice requirements of the policy and that the Y2K-related costs were "ordinary business expenses . . . not within the scope of coverage under the policy."

Xerox moved to dismiss the complaint alleging, among other things, that it was barred by the Year 2000 Readiness and Responsibility Act, and on the basis of forum non-conveniens.

The court denied the motion to dismiss stating that "based upon a plain reading of the statute, the Y2K Act is directed to encompass lawsuits related to a failure to process the year 2000 date-related data." The court noted that "[t]he instant suit is a contract-based action to determine whether an insured provided its insurer with a timely notice of claim and is not premise on a Y2K failure." Moreover, the court noted that since Xerox had commenced a suit in Connecticut, it had waived any right it may have to treat the New York complaint as "pre-litigation notice" under the federal statute.

The court also declined to exercise discretion and dismiss the action on a forum non-conveniens basis, noting that both parties are New York corporations conducting business within the state and that the witnesses reside in both New York and Connecticut. 🍷

—SHR

INSURANCE BROKERING DOES NOT QUALIFY AS A LEARNED PROFESSION FOR STATUTE OF LIMITATIONS PURPOSES

New York's Appellate Division, First Department has held that an insurance broker does not fall within the traditional definition of "learned profession"

so as to be protected by the three year statute of limitations of CPLR 214(6) for non-medical malpractice. In *Santiago v. 1370 Broadway Associates, L.P.*, 695 N.Y.S.2d 326, 1999 N.Y. Slip Op. 07413 (1st Dep't, 1999), the court reinstated a third party complaint by an insured against its broker, holding that the six year statute of limitations of CPLR 213 was applicable, as insurance brokering was not a "learned profession" as are law, accountancy, architecture and engineering. The court expressly disavowed any implication in its earlier decision in *AJ Contr. Co. v. Trident Mgrs.*, 234 A.D.2d 195, 651 N.Y.S.2d 498 (1st Dep't 1996), that the professional malpractice statute of limitations could be applied to insurance brokers and noted that "[a]n insurance broker is not capable of committing 'professional malpractice' in accordance with CPLR 214(6)." 🍷

—SHR

ESTOPPEL DOES NOT CREATE COVERAGE; PLAINTIFF WAS NOT INSURED DURING ACCIDENT

In *Mount Vernon Fire Insurance Co. v. Riccobono*, 1999 WL 777863 (S.D.N.Y., 1999) the U.S. District Court for the Southern District of New York clarified when an insurer can waive its right to disclaim coverage and when it can be estopped from disclaiming coverage.

When its insured, JFD Contracting, notified Mount Vernon of a claim, Mount Vernon, recognizing that the duty to defend is broader than the duty to indemnify, retained a law firm to represent the interests of JFD. After investigating the claim, however, Mount Vernon disclaimed coverage citing a policy exclusion. Mount Vernon filed a declaratory action against JFD and asserted an additional basis to support its disclaimer—that the injuries giving rise to the underlying claim pre-dated the inception of the occurrence-based Mount Vernon policy by almost two years. Although JFD did not dispute that assertion, it argued that since Mount Vernon failed to mention that fact as a basis for initially disclaiming coverage, Mount Vernon had waived its right to disclaim coverage and/or was estopped from maintaining the defense.

The Court disagreed, clarifying the distinction between waiver and estoppel and then determined that Mount Vernon's actions were governed by nei-

ther doctrine. Initially, the court noted that the injury giving rise to the underlying action was outside the policy period and waiver will not create coverage where none exists.

Distinct from waiver, an insurer may be estopped from denying coverage when the insurer assumes the defense of the claim without adequate disclaimer or reservation of rights, and the insured, by relying on the insurer's action, is prejudiced. The court found estoppel to be inapplicable, because Mount Vernon had timely disclaimed coverage and reserved its rights. Moreover, although Mount Vernon had undertaken the defense of JFD, Mount Vernon informed JFD that it intended to seek a declaratory judgment. JFD could not have reasonably believed that Mount Vernon was providing coverage without reservation. 🍷

—*Jung Park*

CLAIMS FOR COVERAGE OF CLEANUP ARE REINSTATED

In *Reynolds Metal Company v. Aetna Casualty & Surety Company*, ___ A.D.2d ___, 696 N.Y.S.2d 563 (3rd Dep't. 1999), New York's Appellate Division, Third Department addressed a recurring issue in environmental claims—whether the insured provided timely notice of the occurrence or claim. In 1995, plaintiff, the operator of an aluminum reduction plant, commenced a declaratory judgment action against numerous primary and excess liability insurers on policies covering the period 1959 to 1986. Plaintiff sought a declaration that its insurers defend and indemnify it with respect to environmental actions brought by the State Department of Environmental Conservation (DEC), the Federal Environmental Protection Agency (EPA) and the St. Regis Mohawk Tribe. The insurers moved for summary judgment arguing that since the plaintiff failed to timely notify them of the occurrence or the claim, the insurers were not obligated to defend or indemnify the plaintiff. While recognizing the well-settled New York doctrine that compliance with the notice provision of a liability insurance policy is a condition precedent to coverage, the court reversed the trial court's dismissal of the action and held that questions of fact existed as to whether the plaintiff had a good faith belief of nonliability or noncoverage, which precluded summary judgment.

Specifically, the insurers argued that as early as December 1983, plaintiff was aware of a claim and should have notified the insurers. Specifically, the insurers took issue with a December 6, 1983 "Potentially Responsible Party" letter the plaintiff received from DEC. The insurers argued that from this letter, plaintiff knew or could reasonably have concluded that a possible claim existed. The insurers pointed to language such as "you may be responsible for the release or threatened release of hazardous substances" and "this letter constitutes a claim." However, plaintiff argued that the letter referenced property which it owned and which the insurers specifically excluded from coverage under their respective policies. The insurers rebutted by stating that the letter included reference to "the natural resources of the State of New York at and around the referenced site."

Despite the "at and around" language, the court held that the plaintiff had a good faith belief in noncoverage, which would preclude the granting of summary judgment. The court also held that plaintiff had a good faith belief of nonliability. Specifically, the December 1983 letter did not identify any third party property which presumably, the policies at issue would have covered. Moreover, DEC classified plaintiff's property as a "3" on the EPA's ranking system for inactive waste sites, signifying that action at the sites might be deferred because they did not then present "a significant threat to public health or environment."

The court held that notice provided to the primary insurers in late 1987 and the excess insurers in the middle of 1988 was not untimely as a matter of law. Prior to that time, the correspondence between the various environmental agencies and plaintiff concerned possible contamination and no remediation was ordered nor an investigation of the site required. Only when plaintiff received a September 10, 1987 letter from DEC, informing plaintiff for the first time that it was a potential responsible party for the contamination of the St. Lawrence-Grasse River and that a portion of that river was included on the EPA's National Priorities List, did the plaintiff notify the primary insurers of a "potential claim." Also, only when plaintiff received a remediation order with estimates for clean-up costs did plaintiff notify the excess insurers.

With respect to the claims brought upon by the St. Regis Mohawk Tribe and the EPA, however, the court held that plaintiff's May 18, 1995 notice to defendants was untimely as a matter of law. As early as May 1989, counsel for the St. Regis Mohawk Tribe wrote to plaintiff of its intention to file suit. In October 1989, the New York Attorney General's Office also sent plaintiff a "notice of intent to sue" These two letters were received by plaintiff subsequent to its own discovery of elevated PCB levels in the St. Lawrence River close to its property and significant contamination at one of its other properties. Also, in early October 1989, plaintiff received a unilateral administrative order from the EPA directing it to investigate and remediate PCB contamination in portions of the St. Lawrence River. Therefore, the court held that plaintiff had enough information to give notice of the St. Regis Mohawk Tribe and EPA claims to the insurers by October 1989; and that it was irrelevant whether any of the threatened suits were actually filed. The court also noted the irrelevance of whether any of the insurers suffered prejudice as a result of the untimely notice. 🐼

—JP

REPUBLICATION ON ELECTRONIC DATABASES HELD TO BE COPYRIGHT INFRINGEMENT

In *Tasini v. The New York Times Co.*, 192 F.3d 356 (2d Cir.1999), the U.S. Court of Appeals for the Second Circuit held that publishers who republished articles on electronic databases without permission are not protected by the privilege against copyright infringement afforded publishers of "collective works".

Six authors of articles previously published in periodicals commenced a copyright infringement action against publishers and owners of electronic databases after the articles were made available on the databases. Each author was a freelance writer; none of the articles at issue was written when its author was employed by the particular periodical; nor was any such article written pursuant to a work-for-hire agreement. The copyright in each article was held by the individual author.

The authors claimed that the copyright each owned in the individual articles was infringed when the defendant publishers provided them to the elec-

tronic databases. Although the defendants did not dispute the authors' ownership of the copyrights in the individual works, they argued that they owned the copyrights in the "collective works" that they produced and, as such, were afforded the privilege under section 201(c) of the Copyright Act, for "reproducing and distributing" the individual works in "any revision of that collective work."

The court recognized that the crux of the dispute was whether one or more of the electronic databases may be considered a "revision" of the individual periodical issues from which the articles were taken and, reversing the district court, which had granted summary judgment in favor of the publishers, noted that "there is no feature peculiar to the databases at issue in this appeal that would cause us to view them as single 'revisions'".

The court took pains to note, however, "that the only issue [being] address[ed] is whether, in the absence of a transfer of copyright or any right thereunder, collective work authors may re-license individual works in which they own no rights." The court continued, "[b]ecause there has by definition been no express transfer of rights in such cases, our decision turns entirely on the default allocation of rights provided by the [Copyright] Act. Publishers and authors are free to contract around the statutory framework." 🐼

—SHR

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